89-465

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RUFUS E. CUNNINGHAM,
Petitioner,
vs.
COUNTY OF LOS ANGELES, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May attorney fees be denied a prevailing civil rights plaintiff under the Civil Rights Attorney's Fees Award Act of 1976 (amending 42 U.S.C. § 1988) because a court concludes, without any further elaboration, that the "balance of equities" disfavors such award?

2. Does the rule of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), requiring district courts to provide "a concise but clear explanation of its reasons for the fee award," apply to decisions of courts of appeals completely denying fees to successful civil rights plaintiffs?

3. Is the failure to prevail against *all defendants* in an action seeking only *money damages* a "special circumstance" justifying the denial of fees incurred prosecuting successful claims?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. THE NINTH CIRCUIT'S "BALANCE OF EQUITIES" DOCTRINE DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT AND THE DOCTRINE IS A CLEAR AND APPROPRIATE STANDARD 2

II. THERE DOES NOT EXIST A CONFLICT WITHIN THE NINTH CIRCUIT REGARDING WHAT CONSTITUTES "SPECIAL CIRCUMSTANCES" 3

III. THE NINTH CIRCUIT DID PROVIDE A CONCISE AND CLEAR EXPLANATION OF THE BASIS FOR DENYING PETITIONER ATTORNEY'S FEES ON APPEAL 4

IV. A DISTRICT COURT MAY REDUCE THE LODESTAR AMOUNT TO MATCH THE LIMITED DEGREE OF PETITIONER'S SUCCESS 5

V. CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

Borunda v. Richmond
885 F.2d 1384 (9th Cir. 1989) 3, 4

Cunningham v. County of Los Angeles
879 F.2d 473 (9th Cir. 1989) 4

Hensley v. Eckerhart
461 U.S. 424, 103 S.Ct. 1933,
76 L.Ed.2d 40 (1983) 2, 5, 6

Rules

Federal Rules of Civil Procedure
Rule 11 3

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STATEMENT OF THE CASE

Respondent County of Los Angeles believes that Petitioner's Statement of the Case is incomplete, and therefore incorporates herein by reference the Court of Appeals facts section of its opinion set forth at pages A-19 to A-20 of the petition, as Respondent's Statement of Facts.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S "BALANCE OF EQUITIES" DOCTRINE DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT AND THE DOCTRINE IS A CLEAR AND APPROPRIATE STANDARD

The gist of petitioner's argument against the Ninth Circuit's "Balance of Equities" Doctrine is that there are not any special circumstances that would render an award of attorney's fees unjust. However, the proposition that petitioner urges this court to adopt is in conflict with applicable decisions of this court. In *Hensley v. Eckerhart* 461 U.S. 424, 430, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) the court held that a prevailing party should ordinarily recover attorney's fees unless special circumstances render such an award unjust. In accordance with the rule that attorney's fees may be denied where special circumstances render such an award unjust, the Ninth Circuit has adopted the rule that for purposes of awarding attorney's fees on appeal, fees may be denied if special circumstances exist.

The Ninth Circuit's conclusion that petitioner was not entitled to attorney's fees on appeal was correct, because petitioner's attorney tested the boundaries of unethical conduct by filing a meritless and frivolous civil rights action against the County of Los Angeles, Sheriff Sherman Block and Sergeant Brusby. In addition, the Ninth Circuit noted that it was inappropriate to reward petitioner's counsel with an award of attorney's fees for appealing a matter which was caused by his own questionable conduct that may even have subjected

petitioner's counsel to Federal Rule of Civil Procedure, Rule 11, sanctions.

It was proper for the Ninth Circuit to deny petitioner's request for attorney's fees because if fees were granted, other attorney's would be encouraged to file meritless claims and to engage in unethical conduct. Moreover, if the Ninth Circuit had awarded petitioner's counsel's attorney's fees, respondent would be saddled with the burden of paying fees to an attorney who should have been sanctioned for violating Rule 11, of the Federal Rules of Civil Procedure.

II. THERE DOES NOT EXIST A CONFLICT WITHIN THE NINTH CIRCUIT REGARDING WHAT CONSTITUTES "SPECIAL CIRCUMSTANCES."

Petitioner contends that there exists a conflict between *Borunda v Richmond* 885 F.2d 1384, 1392 (9th Cir. 1989), and the instant case because *Borunda v. Richmond, supra*, allegedly stands for the proposition that on appeal, a prevailing party is entitled to attorney's fees unless counsel failed to adequately brief the issue. A review of *Borunda v. Richmond, supra*, reveals that the case does not stand for the proposition which petitioner asserts. To the contrary, in *Borunda v. Richmond, supra*, the Ninth Circuit once again adopted the rule that a prevailing party may be denied an award of attorney's fees when special circumstances render such an award unjust. Furthermore, In *Borunda v. Richmond, supra*, the Ninth Circuit did not rule that failure to brief the issue was the only circumstance that would render an award of attorney's fees unjust.

The decision of *Borunda v. Richmond, supra*, is entirely consistent with the present case because in *Borunda v. Richmond, supra*, the Ninth Circuit merely ruled that based on the facts presented, there were no special circumstances which warranted a denial of attorney's fees. In comparison, in the case at bar, the Ninth Circuit did find that based on the facts before it, there did exist special circumstances that rendered an award of attorney's fees unjust.

III. THE NINTH CIRCUIT DID PROVIDE A CONCISE AND CLEAR EXPLANATION OF THE BASIS FOR DENYING PETITIONER ATTORNEY'S FEES ON APPEAL

Petitioner argues that in the published decision of *Cunningham v. County of Los Angeles* 879 F.2d 473 (9th Cir. 1989), the Ninth Circuit failed to articulate the reasons for denying petitioner attorney's fees for appellate proceedings. A review of the Ninth Circuit's published opinion shows that the reason for denying petitioner attorney's fees is that the balance of equities weighed strongly against an award of attorney's fees on appeal. The reasons why the balance of equities weighed against making an award of attorney's fees was set forth by the Ninth Circuit in an unpublished order filed on March 3, 1989. (See petitioner's writ at A-35 to A-37) According to the order, attorney's fees were denied because it would have been unjust to reward petitioner's counsel for engaging in unethical conduct, which consisted of filing a meritless action against the County of Los Angeles, Sheriff Sherman Block, and Sergeant Brusby.

By conveniently ignoring the Ninth Circuit's unpublished order, petitioner has tried to mislead the court and he has chosen to disregarded the Ninth Circuit's reasons for denying him attorney's fees on appeal.

IV. A DISTRICT COURT MAY REDUCE THE LODESTAR AMOUNT TO MATCH THE LIMITED5 DEGREE OF PETITIONER'S SUCCESS

The final reason that petitioner has offered to this court to grant his petition is that his failure to prevail against certain defendants does not affect the degree of success he obtained. In *Hensley v. Eckerhart, id.*, at 438-489, the court held that when calculating an attorney's fee award, the district court must consider the relationship between the amount of the fee awarded and the results obtained, and then reduce the attorney's fees request where the relief obtained is limited in comparison to the scope of the litigation as a whole.

In the present matter, the district court's decision to reduce the Lodestar to reflect the limited degree of success obtained by petitioner is consistent with the principles set forth in *Hensley v. Eckerhart, supra.* Petitioner failed to prevail against the municipality and the municipality's policymaker (*i.e.*, Sheriff Sherman Block). The unsuccessful claims against the County of Los Angeles and Sheriff Block did determine the results obtained because those claims were based on legal theories that were different from the legal theory in which the settlement was based.

Since petitioner failed to prevail on separate legal theories against different defendants, the result obtained by petitioner, which was a modest settlement of his only